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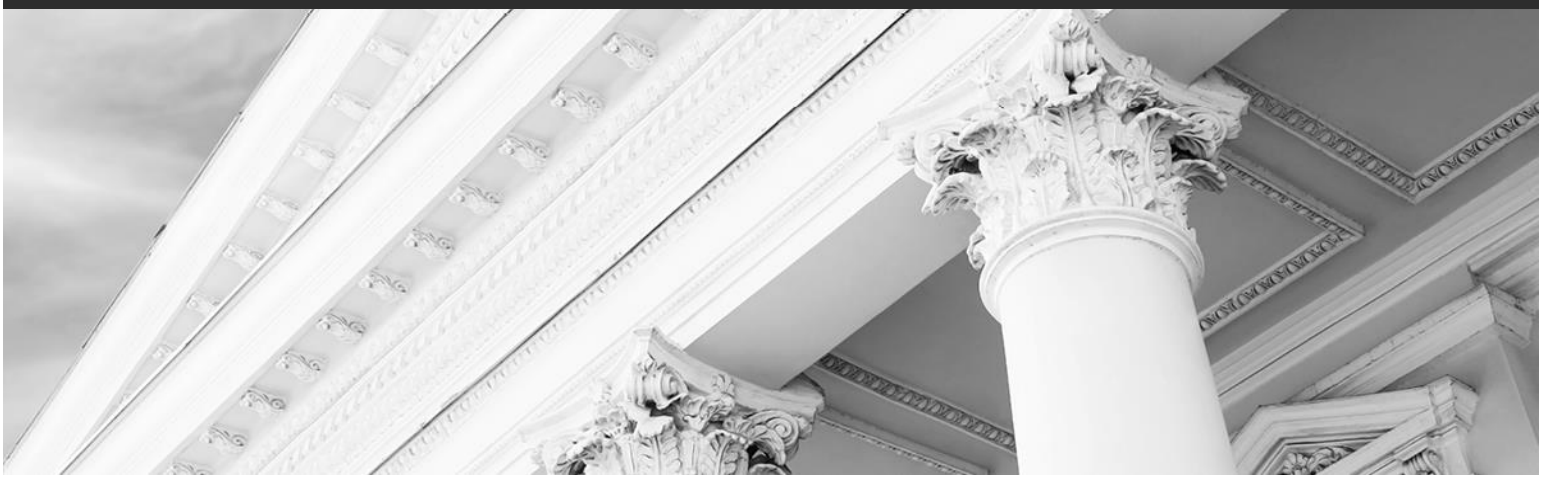

In this Issue:

This Report Provides an Overview and Summary of Recent Class-Action Decisions From Across the United States

Highlights from this issue include:

- Massachusetts state court holds that certifying a nationwide class that included class members with no connection to the state was improper.
- The Second Circuit reinforces the requirement to plead fraud with particularity.
- The Third Circuit reminds district courts of the obligation to conduct a rigorous analysis and that Rule 23's requirements must be satisfied with affirmative evidence.
- The Sixth Circuit holds that a summary judgment decision for defendants in a certified class is not binding absent notice.
- The Seventh Circuit reminds defendants to plead diversity under CAFA based on facts and clarifies when courts must decide "merits" issues when deciding class certification.
- The Ninth Circuit affirms dismissal of consumer fraud claims, even where supported by a survey, where allegations show that no reasonable consumer would be misled.
- A California Court of Appeal confirms that the infamous Song-Beverly Credit Card Act requires a request for personal identification information under circumstances where a reasonable consumer would understand the information was required to complete a credit card transaction.
- The Eleventh Circuit joins the list of Circuits holding that class member standing is relevant to class certification.

First Circuit

In re Daily Fantasy Sports Litig., 2019 U.S. Dist. LEXIS 206689 (D. Mass., Nov. 27, 2019)

Court enforces arbitration agreement formed on the internet, but requires direct benefit for non-parties to be bound.

This decision involved the enforceability of arbitration agreements formed online. Plaintiffs were (i) users of the DraftKings and FanDuel websites, (ii) so-called "cross-over" plaintiffs, users asserting claims against the other website for allowing their employees to play, and (iii) family members of the website user plaintiffs who sought to recover for gambling losses.

The issue before the district court was defendants' motions to compel arbitration. Although the process of agreeing to arbitration differed on the DraftKings and FanDuel websites, the court concluded that the user plaintiffs entered into enforceable arbitration agreements. Specifically, to use the DraftKings website, users had to check a box labeled "I agree" that appeared directly adjacent to the "Terms of Use" containing the arbitration agreement. When using the FanDuel website, assent to the "Terms of Service" was displayed in a four-line block of text below the "Play Now" button, and the court concluded that any reasonable user would notice the disclosure. The district court noted that "the question at hand is not whether the site was optimally designed, but whether a player had actual or constructive notice that there were terms requiring his assent to which he did give assent." Finding that players had reasonable notice, the court noted that it was "highly implausible" that FanDuel users, unlike "a randomized population of potential purchasers of a common consumer product being marketed over the Internet[,]" were "actually puzzled or fooled by the FanDuel sign-in screen."

The district court thus granted defendants' motions to compel arbitration as to the user plaintiffs and cross-over plaintiffs, concluding that arbitration was warranted as to the cross-over plaintiffs because their claims were intertwined with the users' claims, and they were estopped from denying the arbitration clause. The district court refused to allow those plaintiffs to arbitrate and litigate the same claims.

The district court, however, came to a different conclusion as to the family members. Those plaintiffs did not agree to arbitrate, and defendants had not presented any evidence that they received a direct benefit from the agreement. As a result, the family members could bring their distinct state-law claims (which are based on the same set of operative facts) in the judicial forum.

Jackie 888, Inc. v. Tokai Pharms., Inc., 2019 Mass. Super. LEXIS 1206 (Nov. 25, 2019)

State court refuses to certify nationwide class because it lacked personal jurisdiction as to the claims of nonresidents.

In this putative securities class action arising out of an initial public offering of defendant's stock, plaintiff alleged that defendant made misleading statements in its registration statement and prospectus concerning efforts to develop the drug Galeterone, which is used to treat prostate cancer.

The superior court, in denying plaintiff's motion for class certification, addressed whether a Massachusetts state court could certify a nationwide class and exercise personal jurisdiction over out-of-state plaintiffs where Massachusetts Rule of Civil Procedure 23 does not allow absent class members to "opt out." Because absent class members had no contact with Massachusetts – beyond agents in other

states purchasing defendant's stock – the superior court found that certifying a nationwide class was not consistent with due process. Specifically, according to the decision in *Moelis v. Berkshire Life Ins. Co.*, 41 Mass, 482 (2008), without the right to opt out, a Massachusetts court could only assert personal jurisdiction (and certify a nationwide class action) if those plaintiffs satisfied the traditional "minimum contacts" test for personal jurisdiction, which they did not.

Walker v. Osterman Propane LLC, 2019 U.S. Dist. LEXIS 181626 (D. Mass. Oct. 21, 2019)

Court certifies putative state Wage Act class based on evidence of company-wide training that may have violated employees' rights to meal breaks.

Plaintiff brought this putative class action under the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148, alleging that defendant failed to pay its propane delivery drivers during their lunch breaks because (i) their breaks were deducted from their hours automatically even though the defendant knew they did not take breaks, and (ii) they were not relieved of all their duties during their breaks. The district court certified a class under Rule 23(b)(3) as to the plaintiff's second theory of liability, but not the first.

As to the first theory of liability (automatic deductions), the district court concluded that the class was ascertainable and numerosity was met (based on there being over 100 putative class members, noting the oft-cited example of having more than 40 class members to satisfy numerosity). Plaintiff, however, had not shown that there was a company-wide automatic deduction policy and, as such, could not satisfy commonality or predominance considering the individual inquiries needed to determine Wage Act liability and damages.

As to the second theory of liability (work-related duties imposed during break), the court came to the opposite conclusion. Plaintiff based the theory on the allegation that certain safety restrictions/training required delivery drivers to stay within a specific distance of their trucks during breaks. That created a common question of fact (whether drivers were trained to stay within a specific distance) and one of law (whether drivers are relieved of work duties if they are subject to the distance restrictions) that satisfied commonality. The district court further found that those common questions predominated even though individual issues of damages would remain, as such damages could be derived from defendant's records. The district court concluded that typicality was met (as all drivers are required to take the subject safety training), and that proceeding as a class action was superior to individual actions.

Pimentel v. City of Methuen, 2019 U.S. Dist. LEXIS 211512 (D. Mass. Dec. 9, 2019)

Court refuses to certify class because of individual inquiries required to determine if class members were injured by erroneous "advice of rights" form used by state municipal police department.

This case involved a putative class action alleging civil rights violations arising out of an incorrectly worded "advice of rights" form used by the Methuen Police Department before a driver's consent to take (or not take) a breathalyzer test. Although there was no question that the form (written in Spanish) contained "troublesome" mistakes, the district court denied plaintiff's motion for class certification.

The district court concluded that a putative class was ascertainable, but found that plaintiff had not met her burden to prove commonality, typicality or any of the prongs of Rule 23(b). The district court also questioned whether plaintiff had satisfied the numerosity requirement because plaintiff had identified

fewer than 40 putative class members; however, the court declined to rule on this issue because of the other infirmities in the proposed class.

As to commonality, the court held that mere receipt of the erroneous form did not cause a cognizable injury, as Massachusetts "OUI" law only requires "actual consent" as opposed to "informed consent." For the incorrect form to have any cognizable impact, a person would have to read it (or have it read to them) and have relied on it in some detrimental way. Therefore, whether an individual received the form did not present a common question on which liability or damages turned.

Second Circuit

Gamm v. Sanderson Farms, Inc., 944 F.3d 455 (2d Cir. 2019)

Second Circuit holds that if a securities class action is based on claim that public statements were misleading because defendant did not disclose illegal activity, plaintiffs are required to plead the underlying illegal activity with particularity.

The complaint alleged that Sanderson Farms and several other large chicken producers began colluding to inflate the price of chicken by coordinating supply reductions and manipulating a chicken price index. Sanderson Farms allegedly planned the antitrust conspiracy with its competitors during industry meetings and conferences. The conspiracy was also supposedly facilitated at investor conferences organized by Wall Street analysts and attended by Sanderson Farms and its competitors. Plaintiffs, on behalf of themselves and a putative class of purchasers of Sanderson Farms shares, alleged that the failure to disclose this antitrust conspiracy rendered various statements issued by Sanderson Farms during the class period false and misleading.

On appeal, plaintiffs acknowledged that allegations of misstatements and omissions in support of a securities fraud claim must be pleaded with particularity, but argued that the allegations of the facts of the underlying antitrust conspiracy must merely meet the Rule 8 plausibility standard. The Second Circuit disagreed, holding that because plaintiffs were required to plead with particularity sufficient facts to support their contention that Sanderson Farms' financial disclosures were misleading, they necessarily were required to state the facts of the underlying anticompetitive conduct with particularity. Applying this standard, the Second Circuit found that, while the complaint alleged Sanderson engaged in anticompetitive conduct, there was "virtually no explanation as to how the collusive conduct occurred, and whether and how it affected trade." Accordingly, the Second Circuit affirmed dismissal.

Third Circuit

Ferreras v. American Airlines, Inc., 946 F.3d 178 (3d Cir. 2019)

Third Circuit reverses class certification because plaintiffs failed to meet their burden on commonality and predominance.

Ferreras was a wage and hour case in which plaintiffs claimed American Airlines violated the New Jersey Wage and Hour Law by failing to pay its employees for all time worked, due to the manner in which the timekeeping system was programmed. The Third Circuit reversed class certification, finding "three problems: first, the district court effectively certified the class conditionally; second, it applied a pleading and initial evidence standard; and third, it failed to resolve conflicts in the evidence.

As to the first error, the panel directed that "reliance on, and application of, principles of conditional certification [under FLSA] in the Rule 23 context cannot be permitted." On the second error, the panel observed that the district court essentially required plaintiffs only to make a "threshold showing" that the Rule 23 elements were met, reiterating that the Third Circuit "requires a showing that each of the Rule 23 requirements has been met by a preponderance of the evidence at the time of class certification."

Finally, the panel faulted the district court's finding that factual differences among the class could be "addressed during discovery," concluding that "[t]he rigorous analysis demanded by Rule 23 requires a court to resolve such disputes relevant to class certification, before being satisfied that each of the Rule's requirements has been met." Rather than remanding the case, the panel reversed the grant of certification because discovery was complete, and "based on our review of the record, it is clear that commonality and predominance cannot be met."

Ferreras is a reminder that a rigorous analysis must be conducted at the class certification stage, and that plaintiffs must satisfy the Rule 23 elements by a preponderance of the evidence.

Fifth Circuit

Robinson v. Homeowners Mgmt. Enter. Inc., ---S.W.3d---, 2019 WL 6223128 (Tex. 2019)

Texas Supreme Court weighs in on arbitrability of class actions.

In this case, the Texas Supreme Court held that, absent a clear contractual provision to the contrary, a court should decide the threshold issue of whether class allegations must be arbitrated. The ruling overturned prior precedent holding that class arbitration was an issue for the arbitrator where the contract submitted all disputes arising out of the agreement to the arbitrator.

The case arose out of a dispute between homeowners, the Robinsons, with their home-warranty company. The Robinsons sued in Texas state court concerning construction-related defects. The defendant moved to compel arbitration. The arbitration provision in the warranty compelled mandatory binding arbitration under the Federal Arbitration Act (FAA). The warranty did not address who decides issues of arbitrability. On the eve of the arbitration hearing, the Robinsons submitted an amended statement of claim adding class allegations against the defendant alleging it required overbroad releases as a precondition to fulfilling warranty obligations. Defendant vigorously contested this amendment before the arbitrator and filed a motion with the state court. The trial court ruled in the defendant's favor, holding that whether the parties agreed to class arbitration was a question to be decided by the court and the parties' warranty agreement did not permit class arbitration.

The Texas Supreme Court noted that this issue was consequential because courts have exceptionally limited scope to review the decisions of an arbitrator even when wrong on issues of law. Accordingly, the Court addressed two fundamental questions: (1) whether class arbitration is a question of arbitrability presumptively for the court or a question to be arbitrated and, thus, presumptively for the arbitrator; and (2) whether the arbitration agreement clearly and unmistakably evinces a contrary intent.

On the first issue, the Texas Supreme Court held that the question was presumptively for the courts. The Court was persuaded in part based on the unique nature of class litigation and the observation that "arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties."

On the second issue, the Court held that silence on the issue of class arbitration could not be equated to consent. "[T]o interpret silence or ambiguity on the 'who should decide arbitrability' point is giving arbitrators the power . . . [and] might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." For class arbitration to be an issue decided by an arbitrator, the contract must unambiguously and explicitly delegate such authority. The default position will be for the court to decide whether class arbitration is arbitrable.

Sixth Circuit

Faber v. Ciox Health, LLC, 944 F.3d 593 (6th Cir. 2019)

Sixth Circuit holds that an order granting a defendant's motion for summary judgment – issued after class certification, but before class notice – binds only the named plaintiffs.

In a case alleging that the defendant, a medical records company, overcharged the plaintiffs for their medical records, the Sixth Circuit considered a relatively rare procedural question: What happens when a district court grants a defendant's motion for summary judgment after the class has been certified but before class notice has been sent? The defendant argued that the panel should remand the case to the district court for the purpose of issuing opt-out notices, while the plaintiffs argued that the district court's order should be limited to the named plaintiffs.

The panel agreed with the plaintiffs, holding that "[w]hen the defendant moves for and obtains summary judgment before the class has been properly notified, the defendant waives the right to have notice sent to the class, and the district court's decision binds only the named plaintiffs." The panel held that this "general rule" was supported by "Rule 23's text and structure" because some of the Rule's provisions – notice must inform class members that they may enter an appearance through an attorney, and a court may inform class members of the litigation process – are "largely pointless if a district court grants summary judgment before notifying the class." The panel also held that post-judgment notice was not appropriate or equitable in this case because "class members would be prejudiced upon receiving notice of certification for a case they already lost on the merits."

Even though the panel held that the district court's order only applied to the named plaintiffs, it noted that its holding was "limited" to the scenario "[w]here a defendant moves for and obtains summary judgment before the absentee class members have been notified." It also noted that the defendant "still obtained something valuable – a judgment in its favor on the merits that has been affirmed on appeal," and that "principles of stare decisis (and possibly preclusion) will prove to be valuable assets for [defendant] should any absent class members choose to bring similar claims."

Seventh Circuit

Dennis v. Niagara Credit Solutions, Inc., 946 F.3d 368 (7th Cir. 2019)

Seventh Circuit affirms judgment on the pleadings that a debt collector's notice clearly identified the current creditor and did not violate the FDCPA.

Plaintiff filed a putative class action, claiming that defendants violated Section 1692g(a)(2) of the FDCPA by "fail[ing] to identify clearly and effectively the name of the creditor to whom the debt was owed." Plaintiff had fallen behind on his debt owed to Washington Mutual Bank and, after plaintiff's default,

LVNV Funding bought the debt. Niagara Credit sent a notice of collection letter to plaintiff on LVNV's behalf, identifying Washington Mutual as the "original" creditor and LVNV as the "current" creditor.

The Seventh Circuit unanimously affirmed judgment on the pleadings for defendants, calling the plaintiff's claim "meritless" because the letter "expressly" identified LVNV as the current creditor. The district court opined that the letter could have elaborated that LVNV had purchased the debt from Washington Mutual and that LVNV was defendant Niagara's client, but Section 1692(g)(a)(2) of the FDCPA does not require such a detailed explanation of the transactions leading to the debt collector's notice. All that is required is that the debt collector's notice state the required information clearly enough that a debtor would understand it.

Plaintiff further asserted that the district court wrongly prevented him from introducing extrinsic evidence of consumer confusion to prove his case. The Seventh Circuit disagreed, stating that where a letter accurately and clearly identified the creditor to whom the debt was owed, "no evidence of confusion could change the result."

Butler v. BRG Sports, LLC, 2019 Ill. App. LEXIS 841 (Ill. App. Ct. 2019)

Illinois appellate court affirms dismissal of claims against football helmet manufacturers as time-barred.

An Illinois appellate court upheld dismissal on statute of limitation grounds of more than 50 former NFL players' claims against helmet manufacturers. Plaintiffs alleged that defendants were aware of the harmful effects of repeated concussive and subconcussive traumas to players' brains but failed to warn users about these dangers, and therefore should be liable for causing plaintiffs' long-term brain damage.

The issue on appeal involved the "discovery rule," which states that the statute of limitations period does not start until an injured party knows or reasonably should know of his injury. Plaintiffs claimed that the limitations period did not start until they were diagnosed with neurodegenerative disorder, or that it should be tolled due to alleged fraudulent concealment committed by defendants.

The appellate court held that the case was time-barred because it was filed over two years after the same plaintiffs previously sued the NFL in federal court as part of a multi-district litigation. The same plaintiffs had alleged the existence of "head problems" while playing football, which the appellate court panel here found to be an "incontrovertible admission of knowledge" of their injuries. The statute of limitations, therefore, accrued at least as early as the plaintiffs' class action filings against the NFL in federal court. Furthermore, the appellate court rejected plaintiffs' fraudulent concealment claim, finding that defendant Riddell did nothing to "lull the plaintiffs" into not filing suit earlier or discovering their harm.

Roberson v. Symphony Post Acute Care Network, 2019 IL App (5th) 190144-U (Ill. App. Ct. 2019)

Illinois appellate court overturns class certification in case alleging violations of Biometric Information Privacy Act.

The plaintiff sued a health care network, Symphony Post Acute Care Network (SPAN), due to alleged violations of the Illinois Biometric Information Privacy Act (BIPA). Specifically, the plaintiff claimed that defendants violated sections 15(a) and 15(b) of BIPA "by 'actively collecting, storing, and using' the plaintiff's biometric information without providing notice to her, obtaining her written consent, or publishing its data retention policies."

The circuit court granted class certification and certified a primary class that included "[a]ll Illinois citizens whose biometric information was collected, captured, purchased, received through trade, or otherwise obtained in Illinois at any location associated with [SPAN], as set forth in [BIPA]." The defendants appealed, challenging the breadth of the certified class. While noting that class certification is "within the discretion of the circuit court," the Illinois Fifth District Appellate Court assessed the circuit court's certification ruling under 735 ILCS 5/2-801, which requires the satisfaction of traditional class action elements similar to those within Federal Rule of Civil Procedure 23.

Taking issue with the scope of the class, the appellate court held "that the circuit court abused its discretion in certifying the 'primary' class as all Illinois citizens whose biometrics were collected by any SPAN location." The court found that the named defendants owned only the SPAN location in Swansea, Illinois. Therefore, the class as certified could not establish "common questions of law or fact common to the class that [would] predominate over any questions affecting individual members of the class beyond those who were employed [at the Swansea location]." Ultimately, the appellate court modified the class certification to include only plaintiffs "whose biometric information was collected, captured, purchased, received through trade, or otherwise obtained . . . at the [SPAN], location in Swansea, Illinois . . .."

Dancel v. Groupon, Inc., 940 F.3d 381 (7th Cir. 2019)

On a Rule 23(f) appeal, Seventh Circuit emphasizes the importance of alleging sufficient details to satisfy the diversity requirements under the Class Action Fairness Act (CAFA).

In this lawsuit, Christine Dancel alleged that Groupon improperly used class members' photographs to promote its product and sued under the Illinois Right of Publicity Act "on behalf of a class of '[a]ll Illinois residents (1) who maintain an Instagram account, and (2) whose photograph(s) from such Instagram account have appeared on a Groupon Deal offer page'." The district court denied plaintiff's motion to remand and later denied class certification.

Plaintiff received permission to appeal under Rule 23(f), but her argument in this first appeal focused on the denial of her motion to remand, including her argument that Groupon failed to allege diversity of citizenship because the notice of removal merely stated that the proposed class "undoubtedly would include at least some undetermined number of non-Illinois and Non-Delaware citizens as class plaintiffs." Finding that this allegation was insufficient, the Seventh Circuit remanded the case to the trial court so that the defendant could conduct discovery and identify "at least one member of the putative class" who was a non-Illinois or non-Delaware resident at the time of the case's removal.

Dancel v. Groupon, Inc., No. 19-1831, 2019 U.S. App. LEXIS 37515 (7th Cir. Dec. 18, 2019)

Seventh Circuit addresses when district courts must address merits issues in deciding motions for class certification.

This was the second decision involving Christine Dancel's allegation that Groupon violated the Illinois Right of Publicity Act (IRPA) by including her social media account username on a third-party business's website without her permission. After the Seventh Circuit remanded the case, Groupon submitted declarations from several putative class members showing minimal diversity under CAFA. The Seventh Circuit issued this opinion affirming the denial of class certification.

The key issue on this second appeal was when a court must address merits issues in deciding class certification. Plaintiff argued that the district court had improperly decided a merits issue when denying

class certification. She argued that her certification theory was that a username was a categorically protected "identity" under the IRPA, and that, by deciding this issue in defendant's favor, the district court improperly addressed a merits question.

The Seventh Circuit rejected this argument because whether the IRPA categorically protected usernames went to the merits *and* to commonality. The court reasoned that, if plaintiff was right, a substantial portion of the case was subject to common proof. But this alone did not make class certification proper because, if plaintiff was wrong, the case was not subject to common proof. As the court explained, plaintiff was "trying to define the concept of identity in a common way so that it covers up individual questions that each class member might raise." This was not improper, the Seventh Circuit explained, but whether it was successful required a decision on whether the IRPA categorically protected usernames.

Turning to that issue, the Seventh Circuit reasoned that, although the IRPA protects individuals' identities, the protection "extends only so far as that photograph, that name, that *user*name 'serves to identify *that* individual to an ordinary, reasonable viewer.'" The Seventh Circuit thus concluded that determining whether any given username was an "identity" under the IRPA would require an individualized analysis of the username and whether it reasonably identified the associated class members, thus precluding certification.

Eighth Circuit

Hale v. Emerson Elec. Co., 942 F.3d 401 (8th Cir. 2019)

Eighth Circuit determines that differences in state consumer-protection laws may preclude nationwide class certification.

This case involved a proposed nationwide putative class action alleging that Emerson Electric Company violated the Missouri Merchandising Practices Act (MMPA) by marketing its RIDGID brand vacuum cleaner as capable of achieving "peak horsepower," which is only possible in a lab setting. The plaintiffs also brought claims for breach of express warranty, breach of implied warranty, unjust enrichment, and violations of other states' consumer-protection laws.

After the district court certified a nationwide class under Rule 23(b)(3), the defendant filed an interlocutory appeal to the Eighth Circuit, challenging whether the claims of non-Missouri residents relate to "trade or commerce . . . in or from the state of Missouri," and whether "the district court should have conducted separate choice of law analyses for the breach of warranty and unjust enrichment claims."

Agreeing with the defendant, the Eighth Circuit held that the claims from non-Missouri plaintiffs did not involve commerce in or from the state of Missouri, that the MMPA would not cover those transactions, and that the laws of the states where the transactions occurred should govern. As a result, the Eighth Circuit concluded that class certification was inappropriate for the non-Missouri plaintiffs.

The Eighth Circuit also noted that a district court "must conduct an individualized choice-of-law analysis" to ensure that application of a given state's law is neither arbitrary nor unfair, but that the district court here did not do so. Given those errors, the Eighth Circuit decertified the class and remanded back to the district court.

Ninth Circuit

Becerra v. Dr. Pepper/Seven Up, Inc., No. 18-16721, __ F.3d __, 2019 WL 7287554 (9th Cir. Dec. 30, 2019)

Consumer failed to allege that reasonable consumers understood the word "diet" in Diet Dr. Pepper's brand name to promise weight loss, and reference to an alleged consumer survey was insufficient to avoid dismissal.

In this case, plaintiff alleged that the defendants violated various California consumer-fraud laws by branding Diet Dr. Pepper using the word which allegedly misled consumers by promising that the product would "assist in weight loss" or at least "not cause weight gain," and that the alleged promise was false because aspartame caused weight gain. Plaintiff cited dictionary definitions of "diet" to support her allegation that consumers would reasonably believe the word "diet" to promise assistance in weight loss. She also included references to television advertisements and articles to support her allegation that reasonable consumers understand "diet" to promise weight loss. And she summarized results of a survey of California and national consumers, which she contended was proof that most soft-drink consumers believe "diet" soft drinks will help them lose or maintain their weight.

In affirming a decision granting defendants' motion to dismiss, the Ninth Circuit first noted that plaintiff's citations to dictionary definitions involved the use of "diet" as a verb or noun, as in "he is dieting" or "she is starting a diet." The court noted that in contrast, "diet" as used in "Diet Dr. Pepper" is either an adjective or proper noun, which puts the word in a different light. The court held that plaintiff's selective quotations omit the definitions of "diet" as an adjective and the frequent usage of "diet soft drinks" as the primary example of the word's usage in that context to mean "reduced in or free from calories." The court held that, when considering the term in its proper context, no reasonable consumer would assume that Diet Dr. Pepper's use of the term "diet" promises weight loss or management. The court also held that the articles plaintiff cited did not support her claims as a matter of law, because the content of these articles emphasizes that other lifestyle changes beyond merely drinking diet soft drinks are necessary to see weight-loss results. Finally, the court held that the survey plaintiff cited did not address a reasonable consumer's understanding of "diet" in this context to be a relative claim about the calorie or sugar content of the product.

Henson v. Fidelity National Financial, Inc., 943 F.3d 434 (9th Cir. 2019)

Based on intervening change in law, Ninth Circuit gives plaintiffs the opportunity to pursue class allegations that had been voluntarily dismissed with prejudice.

In this decision, the Ninth Circuit clarified the standard that applies to a request under Rule 60(b) for relief from judgment. Plaintiffs asserted claims for violations of the Real Estate Settlement Procedures Act, alleging that Fidelity had improperly received kickbacks in connection with directing business to certain vendors. Plaintiffs moved for class certification, which the district court denied, and then voluntarily dismissed the action with prejudice by stipulation. Under then-existing Ninth Circuit authority, that stipulation would create an adverse final order, and thus the right to pursue a non-discretionary appeal of the certification ruling.

While the appeal was pending, the United States Supreme Court issued its decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), holding that plaintiffs cannot use a voluntary dismissal with prejudice to transform an interlocutory order into an appealable final judgment. The Court reasoned that a contrary

conclusion would be inconsistent with the "firm finality principle" stated in 28 U.S.C. § 1291 and Rule 23(f), which confers discretion upon district courts to permit interlocutory review of class certification orders.

Fidelity moved to dismiss the *Henson* appeal based on *Microsoft*. The Ninth Circuit denied the motion and remanded for further proceedings in the district court. Following remand, plaintiffs moved to vacate the dismissal under Rule 60(b), arguing that *Microsoft* was an intervening change in the law and, as such, they were entitled to relief. The district court denied the motion and, upon review, the Ninth Circuit reversed, finding that the district court erred in the Rule 60(b) analysis.

The Ninth Circuit held that the appropriate analysis involves consideration of the following factors, along with any others that might be relevant: (1) the nature of the intervening change in law; (2) the petitioner's diligence in pursuing relief; (3) whether granting relief would upset the parties' interests in finality; (4) the delay between the finality of the judgment and the Rule 60(b) motion; (5) the closeness of the relationship between the decision underlying the judgment and the intervening change in law; and (6) comity considerations.

Applying the requisite factors, the Ninth Circuit found that plaintiffs were entitled to relief from the judgment, stating that the factors "heavily [tipped] the scales" in plaintiffs' favor. In particular, the Ninth Circuit noted that plaintiffs reasonably relied on its prevailing authority at the time in agreeing to a dismissal so as to seek appellate review of the certification denial. Also, because the parties reached this agreement for purposes of the appeal, Fidelity "could not have reasonably believed that the dismissal was immutably final."

In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation, 942 F.3d 1160 (9th Cir. 2019)

Unhappy spectators at a sporting event fail to state consumer fraud claims against boxer who did not disclose injury prior to a bout.

In this case, consumers and commercial entities brought putative class actions against boxers, personnel associated with them, and a broadcaster, alleging they had been defrauded by concealment of a shoulder injury suffered at training camp by the boxer who lost the bout in question. Upholding the district court's order dismissing the case, the Ninth Circuit held that the consumers and commercial entities were not defrauded by the failure to disclose this information and had not suffered cognizable injury, because, in short, they got what they paid for. Specifically, the plaintiffs merely purchased a license to view the sporting event in question and see what transpired, even if it was not as exciting or good a fight as they may have expected because one of the contestants was recovering from an injury. The court distinguished this case from cases where games were cancelled, strike replacement players were used, or the contestants did something absurd, such as play a different sport.

Johnson v. MGM Holdings, Inc., 943 F.3d 1239 (9th Cir. 2019)

Ninth Circuit encourages courts to cross-check their attorneys' fee awards using a second method of fee calculation.

Following a settlement in a consumer protection class action against a seller of movie boxsets, plaintiff moved for an award of $350,000 in fees. The district court conducted a lodestar analysis of class counsel's billing and applied a 25% cut to the class counsel's hours, and ultimately awarded $184,665 in attorneys' fees. The district court explained that the 25% cut was to account for 1) some block billing; 2) excessive time spent on law firm conferences that did not advance the case or interests of the class; 3) unreasonable travel time billed without any showing that substantive work was performed; 4) duplicative work; 5) unsupported identical conclusory statements of class counsel as the only explanation for why the hours requested were reasonable; and 6) puffery in describing work performed. Plaintiff appealed, arguing that the entire award was arbitrary because the district court did not adequately explain its decision to cut the number of hours by 25%.

The Ninth Circuit affirmed the award and held that the district court's cross-check provided support for the ultimate reasonableness of the district court's award. The Ninth Circuit noted that the district court 1) provided an explicit lodestar calculation to determine the reasonable hourly rate and number of hours expended by class counsel; 2) provided six reasons why a 25% reduction was appropriate; and 3) conducted a percentage-of-recovery analysis as a cross-check. Thus, the district court had provided more than sufficient basis for the Ninth Circuit to evaluate the award.

Roes, 1-2 v. SFBSC Management., LLC, 944 F.3d 1035 (9th Cir. 2019)

Ninth Circuit reverses class action settlement approval based on inadequate notice program and concerns for unfairness.

Exotic dancers brought claims under state law and the Fair Labor Standards Act against various clubs in San Francisco, alleging that they were misclassified as independent contractors. Before certification of any class, the parties reached a class settlement that provided for monetary and injunctive relief, with a claims process. The settlement agreement provided that mailed notice would go out once, after a National Change of Address update; the claims administrator would post notice on the settlement website; and notice posters would be displayed in the clubs' dressing rooms. Following preliminary approval, which was granted over various objections, the administrator mailed 4,681 notices and, after returns and then skip tracing, 560 never were delivered. The district court granted final approval, again over objections.

The Ninth Circuit reversed, finding, as an initial matter, that the notice program did not meet Rule 23's due process standard – i.e., "the best notice that is practicable under the circumstances." The Ninth Circuit accepted the proposition that, in the modern age, it is common to send notice by email, to send notice more than once and even to use social media or electronic message boards. The Ninth Circuit also noted that, for former employees, the notice was particularly insufficient. Those dancers were more likely to not have a current address on file, and also would not have seen the poster displays at the clubs. The Ninth Circuit therefore found that the notice program was not "reasonably calculated" to be effective. In addition, the Ninth Circuit criticized various elements of the settlement, such as a "clear sailing" attorneys' fees agreement, a potential reversion of certain settlement funds to defendants, and large incentive awards provided to two named plaintiffs, as compared to the others.

Willis v. City of Seattle, 943 F.3d 882 (9th Cir. 2019)

Allegations of individual instances of mistreatment, without more, do not constitute an overarching policy of wrongdoing.

Homeless individuals who lived outdoors on public property filed a putative class action seeking declaratory and injunctive relief against the City of Seattle and Washington Department of Transportation (DOT), claiming these authorities engaged in a policy and practice of "sweeps" of encampments that destroyed individuals' property, violating the unreasonable seizure and due process clauses of both the United States Constitution and the Washington State Constitution. Plaintiffs presented voluminous declarations, photographs, and videos of sweeps in support of their motion for class certification. The district court, however, denied plaintiffs' motion for class certification, finding that, while the homeless individuals satisfied the numerosity requirement, they failed to establish sufficiently the existence of a practice that applied uniformly to all proposed class members. Plaintiffs appealed.

The Ninth Circuit affirmed the denial, holding that plaintiffs failed to articulate a practice that was common to the claims of the proposed class. Even though plaintiffs had presented a voluminous record of individual instances of sweeps, there was no evidence that every homeless individual experienced the same challenged practice or suffered the same injury under the government's policy and practice. In fact, plaintiffs had acknowledged that each sweep was different. Thus, the Ninth Circuit held that the district court did not abuse its discretion in denying certification.

Holcomb v. Weiser Security Services, Inc., No. 219CV02108ODWASX, 2019 WL 6492244 (C.D. Cal. Dec. 3, 2019); *Lopez v. First Student, Inc.*, 2019 LEXIS 218515 (C.D. Cal 2019)

In wage-and-hour cases, courts evaluate the reasonableness of assumed violation rates on motions to remand following CAFA removal.

In *Holcomb*, plaintiff asserted 10 causes of action against his employer, on a proposed class-action basis, alleging failure to provide wages and rest periods, among other things. The employer removed the case and plaintiff filed a motion to remand, arguing that the removal relied on "speculative violation rates" to establish the amount in controversy. The court noted that "violation rates" in wage-and-hour cases are "key to the calculations" necessary to the amount-in-controversy analysis, and that there are two notable "end points." On the one hand, it could be reasonable to assume a 100% violation rate based on an allegation of a "uniform practice." On the other hand, it would be unreasonable to do so based on an allegation of a "pattern and practice" of violations. Applying these principles, the court found that the evidence submitted – a declaration stating only the number of employees in the proposed class, the weighted hourly rate for the employees, and the number of work weeks – did not support the use of a 100% violation rate. The court also noted the presence of pattern and practice allegations (e.g., engaging in certain conduct repeatedly) in the complaint, and allegations suggesting less than a uniform practice. The court therefore granted the motion to remand.

Meanwhile, in *Lopez*, plaintiffs sued their employer for, among other things, failure to pay split-shift wages and failure to provide adequate wage statements. The employer removed, and plaintiffs moved to remand, contesting the showing on amount-in-controversy. In this instance, the court denied the motion to remand, finding that plaintiff's allegations, on their face, supported an assumption of a 100% violation rate. The court noted that plaintiffs' allegations were "as general and expansive as possible, presumably for the purpose[s] of alleging as large a class of individuals as possible [and maximizing recovery]" and

that plaintiffs' "failure to limit their allegations in any meaningful way" justified the assumptions of a 100% violation rate.

Wishnev v. Northwestern Mutual Life Insurance Co., 8 Cal. 5th 199 (2019)

California Supreme Court holds that insurers are exempt from disclosing compound interest charges under state law.

An insured commenced a putative class action in state court against a life insurer, asserting causes of action for declaratory judgment, violation of the Unfair Competition Law (UCL), violation of usury law under the California Civil Code, and unjust enrichment and money had and received, based on allegations that the insurer charged compound interest on life insurance policy loans without his written agreement that interest would be compounded. Northwestern Mutual removed the action to federal court pursuant to the Class Action Fairness Act (CAFA) and moved to dismiss. The district court denied the motion to dismiss. Northwestern Mutual appealed to the Ninth Circuit, and the case was consolidated with appeals in similar proposed class actions filed against Metropolitan Life Insurance Co. and New York Life Insurance Co. over the interest charges. After hearing arguments in the consolidated appeals, a Ninth Circuit panel sought the California Supreme Court's guidance on whether insurers are exempt from the restrictions on compound interest charges.

The California Supreme Court unanimously found that insurance carriers are not subject to a provision of the state's constitution that generally requires lenders to obtain borrowers' signed consent before they can charge compound interest on loans. The restriction initially went into effect in 1918 after California voters approved an initiative measure designed to streamline the regulation of California lenders. But in 1934, an amendment to the measure exempted certain lenders from the restrictions, including credit unions and some banks. Subsequently, in 1979 and 1981, additional amendments expanded the list of exempt lenders. The California Supreme Court held that the 1934 amendment implicitly repealed the limitation on compound interest charges for exempt lenders, including insurers such as Northwestern Mutual. However, the court clarified that this "does not mean exempt lenders may charge compound interest without a contractual or legal basis to do so. It simply means they are not subject to statutory liability and penalties otherwise imposed by the 1918 initiative on nonexempt lenders."

Modaraei v. Action Property Management, Inc., 40 Cal. App. 5th 632 (2019)

California Court of Appeal holds that if the parties' evidence is conflicting on the issue of whether common or individual questions predominate, the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met.

Plaintiff, a former community manager (CM) of a property management company that provided services for common interest developments, brought a proposed class action for misclassification of CMs and general managers (GMs) as exempt employees rather than non-exempt employees under Industrial Welfare Commission wage order No. 5-2001. Plaintiff moved to certify two subclasses of employees: CMs and GMs from 2008 to 2017, based on a common core of non-exempt tasks. Plaintiff presented eight declarations of and deposition testimony from nine CMs and GMs stating that while the properties they managed were different, responsibilities and tasks the managers performed were the same. In contrast, Action Property Management, Inc. (APM) presented declarations of more than 30 putative class members, showing variations in complexity of the tasks performed and time CMs and GMs spent on those tasks. For instance, properties that CMs and GMS managed varied "in size from a single building with 28 units to a property with 2,892 single-family residences.... Individual home values across properties

rang[ed] from $200,000 to $30,000,000. Amenities varied from properties with a few amenities to a property with a club house, swimming pool, tennis courts, bocce ball courts, fitness center, learning center, ballroom, café, spa, conference rooms, and a golf course. Some managers supervised no other employees, while one supervised as many as 80."

The trial court compared and contrasted evidence presented by both parties, crediting APM's evidence over plaintiff's and concluding that the liability for each class member would turn on how individuals actually spent time on a property-by-property basis and manager-by-manger basis. Thus, the trial court denied Plaintiff's motion for class certification, stating that plaintiff failed to show predominance of common questions and superiority.

The California Court of Appeal for Second Appellate District affirmed the trial court's order denying plaintiff's motion for class certification. It held that when "the parties' evidence is conflicting on the issue of whether common or individual questions predominate (as it often is…), the trial court is permitted to credit one party's evidence over the other's in determining whether the requirements for class certification have been met." Thus, the trial court's weighing and crediting one party's evidence over conflicting evidence from another party did not constitute an "improper criteria" or "incorrect legal analysis" that would warrant a finding of an abuse of discretion. In addition, the Court of Appeal also detailed the wide variety of tasks performed by CMs and GMs identified in APM's evidence and held that substantial evidence supported the trial court's finding.

Sarun v. Dignity Health, 41 Cal. App. 5th 1119 (2019)

California Court of Appeal holds that trial court erred in finding no ascertainable class where the definition was defined in objective terms that would allow members to identify themselves without an unreasonable commitment of expense or time.

A patient filed a putative class action against a hospital, alleging unfair and/or deceptive business practices under Business and Professions Code section 17200 (UCL) and violation of the Consumers Legal Remedies Act (CLRA), and seeking declarations that the hospital's billing practices as they related to uninsured patients who received emergency care were unfair and/or unconscionable. The trial court denied the motion for class certification, finding the class was not ascertainable. According to the trial court, common issues of fact did not predominate because it would be necessary to determine whether thousands of individual rates were reasonable or unconscionable to provide meaningful relief. For the same reason, a class action was neither manageable nor a superior method for resolving the litigation. The patient timely appealed.

The Court of Appeal for the Second Appellate District reversed the trial court's denial and remanded with directions. Applying the California Supreme Court's recent decision in *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955 (2019), the Court of Appeal noted that "the threshold requirement of ascertainability for class certification is satisfied when the class is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary. We regard this standard as including class definitions that are sufficient to allow a member of the class to identify himself or herself as having a right to recover based on the class description." According to the Court of Appeal, the trial court had used an unduly restrictive standard to evaluate the proposed class's ascertainability and erred when it found no ascertainable class existed. Thus, the class of patients treated at the hospital and either billed at full published rates or at rates with uninsured discounts was an ascertainable class.

Williams-Sonoma Song-Beverly Act Cases, 40 Cal. App. 5th 647 (2019), review denied (Jan. 2, 2020)

California Court of Appeal holds that Song-Beverly Credit Card Act of 1971 does not prohibit merchants from requesting a consumer's personal identification information unless the request is made under circumstances that would lead a reasonable person to believe the information is required to complete a credit card sales transaction.

This case involved alleged violations of the Song-Beverly Credit Card Act of 1971 ("Song-Beverly Act"). The Song-Beverly Act makes it unlawful for merchants to request or require customers to provide personal identification information as a condition to accepting a credit card payment. Plaintiffs alleged that retailer Williams-Sonoma, Inc. violated the Song Beverly Act by requesting and recording zip codes and/or email addresses from customers who used credit cards for in-store purchases between 2007 and 2011. Williams-Sonoma argued that liability under the Song-Beverly Act depends on requesting or requiring personal identification information *as a condition to accepting credit card payment*. Williams-Sonoma presented testimony and evidence that its employees were trained to explain that zip codes and email addresses were requested solely for marketing purposes and were not required to make purchases. Williams-Sonoma had also posted signs at the cash registers stating the same. Moreover, the employees had discretion not to solicit a customer's zip code or email and were neither rewarded for collecting personal identification information nor disciplined for not soliciting such information.

The trial court initially granted plaintiffs' motion to certify the class of all persons from whom Williams-Sonoma requested and recorded such information in conjunction with a credit card purchase, but subsequently decertified the class. It held that any violation under the Song-Beverly Act would depend on the conditions of individual transactions (i.e., presence and visibility of posted signs or verbal advisements by the sales clerk) and whether any given customer provided personal identification information under circumstances that would lead a reasonable person to believe that such a provision was necessary to complete the credit card transaction. Because of the variations and plaintiffs' lack of a trial plan to manage the individual liability issues, the trial court held that the class action was not manageable.

On appeal, the California Court of Appeal for the First District affirmed the trial court's order decertifying the class, holding that the trial court correctly applied the legal standard stated in *Harrold v. Levi Strauss & Co.*, 236 Cal. App. 4th 1259 (2015), and that its ruling was supported by substantial evidence. In *Harrold*, the Court of Appeal held that the Song-Beverly Act does not prohibit merchants from requesting personal identification information *unless* the request is made under circumstances that would lead a *reasonable* person to believe the information is required to complete the transaction. Consistent with *Harrold* and other authorities, the trial court had correctly ruled that the Song-Beverly Act is violated only if the retailer requests personal identification information under circumstances in which a reasonable customer would understand the information was required to complete the credit card transaction.

Tenth Circuit

Anderson Living Trust v. Energen Resources Corporation, No. 13-cv-909, 2019 WL 6618168 (D.N.M. Dec. 5, 2019)

Court determines that differences in oil and gas lease agreements did not preclude certification of a class that brought claims for underpayment of royalties under the various lease agreements.

In *Anderson*, the plaintiffs, consisting of Colorado royalty owners with interests in numerous oil and gas lease agreements, sought to certify a class "based on a single underpayment theory, namely that [the defendant] failed to pay additional royalties on gas used as fuel."

On the issue of commonality, the defendant claimed that "variations in the lease language preclude a finding of commonality." The court disagreed and determined that the leases created a single and uniform obligation: to pay Colorado royalty owners royalties on gas used as fuel. Similarly, the defendant also argued that the differences in gas quality, and the attendant issue of marketability, defeated commonality. Yet the court again disagreed and determined that those differences related "more to the calculation of damages, which is not before the Court." Therefore, the court determined there was sufficient commonality.

On the issue of predominance, the defendant advanced a similar argument that "differences in lease provisions regarding post-production use of fuel gas means that damages must be calculated individually, and that different damages defeat predominance." The court again disagreed and determined that the predominant question was whether the defendant owed the class royalty payments and failed to pay, and that individual damage calculations, standing alone, cannot defeat class certification.

Finally, the court considered the issues of superiority and ascertainability, concluding that individual lawsuits would be too expensive and that all putative class members were present lease owners who could be readily identified. The court agreed with plaintiff that it does not make sense that the defendant would pay royalties without knowing who it was paying. After determining that the plaintiff class satisfied all requirements of Rule 23, the court certified the class.

Eleventh Circuit

Debernardis v. IQ Formulations LLC, 942 F.3d 1076 (11th Cir. 2019)

Eleventh circuit allows putative class action based on benefit-of-bargain rationale in case involving dietary supplements.

Plaintiffs asserted claims against IQ Formulations LLC and Europa Sports Products, Inc. under (i) Florida's Deceptive and Unfair Trade Practices Act; (ii) Illinois Consumer Fraud and Deceptive Business Practices Act; (iii) New York General Business Law § 349, *et. seq.*; (iv) common law fraud, and (v) unjust enrichment. The dietary supplements in questions contain MethylPentane Citrate ("DMBA"). Plaintiffs alleged that DMBA was a new dietary ingredient prohibited under the FDCA. Defendants did not assert any of the exceptions under the FDCA; accordingly, the issue was whether purchasing a supplement banned under federal law constituted an injury in fact.

The Eleventh Circuit held that "[a] person experiences an economic injury when, as a result of a deceptive act or an unfair practice, he is deprived of the benefit of the bargain." The court concluded that a supplement containing an adulterated substance had no value, and as such, the plaintiffs suffered an economic injury because they were deprived of the benefit of the bargain. The court reasoned that "some defects so fundamentally affect the intended use of a product as to render it valueless." The court pointed out that the Seventh Circuit reached a similar conclusion in a 2011 case, ruling that a product that cannot be legally sold in the United States is not just diminished in value, but has no value at all. Based upon that rationale, the Eleventh Circuit held that plaintiffs had alleged facts sufficient to establish Article III standing to bring the claim.

Cordoba v. DIRECTV, LLC, 942 F.3d 1259 (11th Cir. 2019)

Eleventh Circuit determines that standing of class members is relevant to certification.

Cordoba sued DIRECTV and its telemarketing vendor, Telecel Marketing Solutions, Inc. alleging he had received telemarketing calls on DIRECTV's behalf in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Cordoba alleged that he received 18 calls despite his consistent demand that he not be contacted. He sought to represent "a class of all persons who received more than one telemarketing call from Telecel on behalf of DIRECTV while it failed to maintain an internal do-not-call list in violation of … FCC regulations." Telecel admitted that the company failed to maintain an internal do-not-call list as required by FCC regulation.

The trial court certified two classes of plaintiffs: (1) all individuals who received more than one telemarketing call on or after Oct. 27, 2011, when Telecel failed to maintain an internal do-not-call list in violation of 47 C.F.R. §§ 64.12000(d)(1)-(6); and (2) all individuals whose telephone numbers were on the National Do Not Call Registry who received calls from Telecel after Oct. 27, 2011. The second class of individuals were not part of the appeal, since their claims did not raise any issues with respect to class certification.

Reversing certification, the Eleventh Circuit held that, although the plaintiff had standing, the trial court had not addressed whether putative class members had standing. Individuals who received a telemarketing call but who had not requested that their names be placed on a do-not-call list did not have any apparent injury. "If many of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct, then they would not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether to certify a class." Because there was a real possibility that a large number, perhaps most individuals in the class, had not suffered any injury based on the defendant's conduct, certification was not appropriate, and the court remanded for further proceedings consistent with its analysis.

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